No. 386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

OLUF BORUP, *et al.*, seamen on board the American Whale Factory Ship "ULYSSES",

Petitioners,

against

American Whale Factory Ship "ULYSSES", her engines, boilers, tackle, apparel, furniture, etc., and WESTERN OPERATING CORPORATION, Owner, and H. M. MIKKELSEN, Master,

Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI

LYMAN STANSKY,
Proctor for Petitioners.

HERBERT LEBOVICI,
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PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of the petitioners, Oluf Borup, et al., respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This petition for certiorari is concerned with the payment of seamen's wages.

The Whale Factory Ship ULYSSES in April of 1940 was returning to Norway upon the conclusion of a season's whaling operations in the Antarctic, when Norway was invaded by Germany (418).* The ULYSSES, a United States

* References are to folios unless otherwise indicated.

owned and registered vessel, was thus forbidden by the terms of the Presidential Proclamation under the Neutrality Act, from returning to Norway (4 Fed. Reg. 1939). The ULYSSES then proceeded to New Orleans.

The ULYSSES, at New Orleans (418), then discharged its cargo of whale oil taken during the season, and proceeded to New York, where she arrived on May 10, 1940 (418). On June 29, the owners having decided to convert her to a bulk oil carrier, the ULYSSES put into Robbins dry-dock at Brooklyn, New York, where the conversion was made (421).

The respondents, not having the money with which to pay the seamen their wages (311-312), failed to discharge them (Record, p. 405), and, except for about 96 of the 250, who at different times took jobs on other vessels going foreign without receiving their wages in full (425), the members of the crew remained on board obedient to the master's orders (471). On July 1, 1940, they filed a libel in form in personam and in rem, but process was issued and served only in personam (2). Meanwhile, the crew remained on board, obedient to the master's orders and performing services (471).

In July, the seamen made an application by motion to the District Court for an order to compel the respondents to pay them an advance against the wages that were indisputably due (278-282). In an affidavit sworn to on *July 15, 1940,* and signed by the vice-president of the respondent, Western Operating Corporation, Mr. Blake, who was likewise proctor for the respondents, the respondents stated to the Court as follows (306):

> "In the meantime the libelants are still on the payroll and their wages are accruing, * * *."

On September 1, 1940, they were ordered by the chief mate to cease further work (473). On October 11, 1940, the ship was arrested pursuant to process in rem (8).

The relevant documents forming the petitioners' contract of shipment provided with regard to the duration of the voyage that it was (Libelants' Exhibit I)

> "* * * from Sandefjord on a whaling trip to the Antarctic and thence to Sandefjord or port of discharge."

Another provision of their agreement provided (Libelants' Exhibit II)

> "Wages run from and including the day of entering the service *until discharge occurs;"* (italics ours).

The principal question presented below and upon this application for certiorari is, when did the seamen's wages stop accruing.

The District Court held that the seamen's right to wages terminated on May 15, 1940, because on or about that date, the voyage, as a "whaling voyage" terminated (948-949). The Circuit Court of Appeals' decision, affirmed that decree, basing its decision upon the theory of frustration of adventure by the Presidential Proclamation of April 10, 1940.

It is petitioners' contention that this holding was erroneous in that the frustration or impossibility of performance related only to the question of the vessel's return to

Norway. However, the express provision of the seamen's contract provided for an alternative and possible method of performance, *i.e.*, discharge at the Port of New York or elsewhere (Libelants' Exhibit I). Such being the case, it was required of the respondents, both under the provisions of the seamen's contract which provided that wages should continue until they were discharged, as well as under relevant provisions of the laws of the United States, that they perform their contract with the seamen in the alternative method still possible and required in the contract and that was to discharge the seamen and pay them their wages up to the time of their discharge. In fact, the petitioners were never discharged by the respondents, but, inasmuch as the petitioners arrested the vessel pursuant to process in rem on October 11, 1940, it will be conceded for purposes of this appeal, that the right to wages terminated as of October 11, 1940.

One further question is presented upon this application, that of the petitioners' repatriation. Their contract provided (447):

> "The employed may be signed off at any place whatever according to the wishes of the company. In case of signing off the employed is entitled to a free passage and wages until he reaches the place of signing on."

Both the District and Circuit Courts below denied repatriation to those seamen who, while awaiting adjudication of their right to it, or resumption of normal communications between the United States and Norway, "shipped foreign"; that is, took other jobs awaiting the oppor-

tunity to be repatriated. It is our contention that this qualification of their right to be repatriated is novel and unwarranted.

Questions Presented.

1. Were the respondents required to discharge the petitioners and pay them their wages to the date of their discharge, where the contract of employment provided for payment of wages to the date of their discharge?

2. Where alternative methods of performance were provided for in the contract of employement, *i.e.*, return to Sandefjord or port of discharge, and one of the alternatives, that of return to Sandefjord became impossible of performance by reason of the Presidential Proclamation of Neutrality of April 10, 1940, were the respondents not required to perform, pursuant to the remaining alternative, that is, to have discharged them elsewhere and to have paid them their wages to the date of their discharge?

3. Where the respondents have judicially admitted that wages will continue to accrue, and where the seamen have been held obedient to the masters orders, and where the conduct of the respondents has led the seamen to believe that wages were continuing to accrue and that services performed were earning wages,

   (a) are the respondents not bound by their judicial admission of liability; and

(b) are they not estopped to deny the claim for wages, which their conduct had led the seamen to believe, were continuing to accrue?

4. Where the contract of employment provided for free passage to the place of signing on (repatriation), should this free transportation or the reasonable value thereof be denied to those petitioners, who, pending the resumption of normal communications between the United States and Norway, shipped foreign.

B.

Reasons Relied Upon for the Allowance of the Writ.

1. It has been the universal holding, save for a few exceptions not here applicable, that seamen are entitled to be paid their wages until the date of their discharge. Such was also the provision of their contract and so, too, it is contended, is the legislative policy of our Government as enunciated in our statutes. The holding of the Circuit Court below is in conflict with these well established principles of maritime law. It is further in conflict with the decision of the United States Circuit Court for the Fourth Circuit in the case of the *Sonderborg*, 47 Fed. (2d) 723, 726 (1931), in this respect, as well as with the decision in the case of the *Prahova*, 38 Fed. Sup. 418, 426 (D. C. S. D., Cal., 1941). It is likewise in contravention of the General Maritime Law, as established by the specific provi-

sions of the maritime laws of practically all nations, which laws universally require that seamen be paid to the time of their discharge. *Title 46 U. S. C. A.*, Sections 596 and 597, 641-646; England*—*Laws of England,* Volume 26, Shipping & Navigation, Part 3, p. 47, Act of 1880, Sec. 73; Denmark—*International Labor Office Legislative Series,* Den. 2, p. 3; Norway—*Collection of Norwegian Laws &c.,* published for use of the Legations and Consulates, p. 315; Sweden—*Merchant Seaman's Law,* reprinted from Statute Book of Legations and Consulates, p. 265; Finland—*International Labor Office Legislative Series,* Fin. 1, p. 4; Panama—*Consular Tariff Decree No. 71,* Article 1222.

2. The effect of the decision of the Circuit Court, that a seaman's contract may terminate without his knowledge, and, in fact, despite the express promise of the vessel to the contrary, may have serious consequences for both the seamen and the maritime world. It, in effect, forces the seaman to decide at his own risk, whether or not his contract may have terminated, despite the contract's express provision for continuation until discharge and despite the express promise of the respondents. As a corollary, it may in the future permit malicious masters to log as deserters seamen, who, in all honesty and good faith made the determination that their contract had ended, with a consequent forfeiture and withholding of pay.

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* Text of all foreign statutes set forth in Appendix.

3. The holding of the Circuit Court is in conflict with the universal holdings of the Federal and State Courts to the effect that where a contract provides that one of two alternatives shall be performed by the promissor, the fact that one alternative is frustrated, or becomes impossible of performance, does not excuse the promissor from performing that which remains possible. *Yankton Sioux Tribe of Indians* v. *United States,* 272 U. S. 351, 358; *P. N. Gray & Co., Inc.* v. *Cavalliotis* (E. D. N. Y.), 276 Fed. 565, 571; *Irvine* v. *Postal Telegraph Cable Co.* (Cal.), 173 Pac. 487, 488; *Beckwith* v. *Sheldon* (Cal.), 145 Pac. 97, 99; *Edgar G. Acker, Inc.* v. *Rittenberg, et al.* (Mass.), 152 N. E. 87, 88; *Drake* v. *White,* 117 Mass. 10, 13; *Stephens* v. *Webb,* 173 Eng. Rep. 27, 28; *Da Costa* v. *Davis,* 126 Eng. Rep. 882, 883; *Trotter* (4th Ed.) *"Law of Contracts During and After War"*, p. 129; *Williston on Contracts* (Revised Ed.), Vol. 6, Section 1961.

4. The Circuit Court, in failing to hold that the respondents' admission of liability was binding upon them, and continued their liability for wages beyond the date fixed by the District Court, departed from those decisions of our Federal Courts which held that the courts will leave the parties where their admissions find them. *National Steamship Co.* v. *Tugman,* 143 U. S. 28, 31, 32; *John E. Garman, etc.* v. *U. S.,* 34 Ct. Cl. 237, 242; *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 263; *L. P. Larson Co.* v. *William Wrigley, Jr. Co.,* 253 Fed. 914, 918 (C. C. A. 7th)

1918; *Wigmore on Evidence* (Third Ed.), Vol. 9, Section 2590.

5. Repatriation has been a long well established right of seamen, both foreign and American. *Brunent* v. *Taber* (D. C., Mass.), 1854, Fed. Cas. 2054, p. 481; *Antone* v. *Hicks* (D. C., Mass.), 1874, Fed. Cas. 493, p. 1061; *The Mary Belle Roberts* (D. C., Cal.), 1875, Fed. Cas. 9200, p. 961; *Jenkins, et al.* v. *U. S. Emergency Fleet Corp.* (D. C., Wash.), 1920, 268 Fed. 870, 871; *Gerber* v. *Spencer* (C. C. A. 9th), 1922, 278 Fed. 886, 891. In addition, in the instant case, the employment contract specifically provided for repatriation (447). The decision of the Circuit Court below, which qualified this right by denying it to those seamen who shipped foreign, pending the resumption of normal communications between the United States and Norway, is a qualification on the right of repatriation, new to the Maritime Law. This qualification seriously affects the rights of merchant seamen of the United Nations, including the United States.

WHEREFORE, the petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify, and to send to this Court for its review and determination on a day to be therein named, a full and complete transcript of the record of all the proceedings in the case; and that the said judgment of the Circuit

Court of Appeals for the Second Circuit may be reversed by this honorable Court and that the petitioners may have such other and further relief in the premises as to this honorable Court may seem just, and

YOUR PETITIONERS WILL FOREVER PRAY.

Respectfully submitted,

LYMAN STANSKY,
Proctor for Petitioners.

HERBERT LEBOVICI,
Proctor for Petitioners.